Supreme Court, U.S.
FILED

05-766 DEC 12 2005

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No. 05-

In the Supreme Court of the United States

APCC SERVICES, INC., ET AL.,

Petitioners,

v.

SPRINT COMMUNICATIONS COMPANY L.P., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. WARD
Michael W. Ward, P.C.
1608 Barclay Boulevard
Buffalo Grove, IL 60089
(847) 243-3100

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
DAMON W. TAAFFE
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

QUESTION PRESENTED

Whether the express right of action to sue for damages arising from common carriers' violations of the Communications Act (47 U.S.C. §§ 206-207) permits suits against common carriers that fail to pay compensation to payphone service providers in accordance with FCC orders, when the FCC has determined that a carrier's failure to pay violates (1) Section 201(b), which prohibits unjust or unreasonable practices by common carriers; (2) Section 416(c), which establishes a "duty of every person * * * to observe and comply with" "[e]very order of the Commission" and (3) Section 276, in which Congress directed that payphone service providers must be "compensated for each and every completed intrastate and interstate call."

PARTIES TO THE PROCEEDING

The petitioners, plaintiffs-appellees below, are APCC Services, Inc.; Data Net Systems, L.L.C.; Davel Communications Group, Inc.; Jaroth, Inc. d/b/a Pacific Telemanagement Service; NSC Telemanagement Corp., n/k/a Intera Communications Corporation; and Peoples Telephone Co., Inc.

The respondents, defendants-appellants below, are Sprint Communications Co., L.P., and AT&T Corporation.

RULE 29.6 STATEMENT

APCC Services, Inc., a Virginia corporation, is a for-profit subsidiary of the American Public Communications Council, Inc., a District of Columbia not-for-profit corporation that is not publicly traded.

Data Net Systems, L.L.C., is an Illinois Limited Liability Company that is not affiliated with any publicly traded company.

Davel Communications Group, Inc. is an Illinois corporation whose parent corporation, Davel Communications, Inc., is a publicly traded corporation that holds a 10 percent or greater ownership in Davel Communications Group, Inc.

Jaroth, Inc. d/b/a Pacific Telemanagement Services is a California corporation that is not affiliated with any publicly traded company.

NSC Telemanagement Corporation n/k/a Intera Communications Corporation is a California corporation that is not affiliated with any publicly traded company.

Peoples Telephone Company, Inc. is a Florida corporation whose parent corporation, Davel Communications, Inc., is a publicly traded corporation that holds a 10 percent or greater ownership in Peoples Telephone Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (App., *infra*, 1a-30a) are reported at 418 F.3d 1238. The district court's order denying Sprint's motion to dismiss and granting in part petitioners' motion to amend their complaint (App., *infra*, 79a-80a) is unreported, but the court's reasons are explained in a concurrent decision in a related case, *APCC Services, Inc.* v. *Cable & Wireless, Inc.* (App., *infra*, 81a-93a), which is reported at 281 F. Supp. 2d 52. The district court's orders denying motions for reconsideration and granting certification of an interlocutory appeal (App., *infra*, 31a-45a and 46a-60a) are reported at 297 F. Supp. 2d 90 and 297 F. Supp. 2d 101. Opinions of the district court addressing issues other than the ones raised in this petition (App., *infra*, 61a-78a, 94a-108a, and 109a-145a) are reported at 281 F. Supp. 2d 41, 254 F. Supp. 2d 135, and 305 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2005. The orders of the court of appeals denying rehearing and rehearing *en banc* (App., *infra*, 148a-151a) were entered on November 10, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at App., *infra*, 152a-179a.

STATEMENT

These consolidated cases concern the manner by which Congress creates an *express* private right of action, and the deference owed to the Federal Communications Commission (FCC) when it exercises its delegated authority to specify practices that violate the Communications Act. A common carrier

that violates the Act is liable for damages sustained in consequence of the violation. 47 U.S.C. § 206. Injured persons may recover damages, either through proceedings at the FCC or by suing in district court, pursuant to a right of action expressly provided in the Act. 47 U.S.C. § 207. The FCC determined that interexchange carriers (IXCs or, colloquially, long-distance carriers) violate three separate provisions of the Act if they fail to pay compensation to payphone service providers (PSPs) in accordance with FCC orders that require such payment. If the FCC's determinations are given the deference they deserve, PSPs have a right to sue in district court under Section 207[1] to recover unpaid compensation. A divided panel of the D.C. Circuit held that PSPs have no right of action to bring such cases.

The panel held that petitioners have no right of action under Section 207 to assert claims that respondents' refusal to pay compensation in accordance with the FCC's rules is an "unjust or unreasonable" practice that violates Section 201(b). In doing so, it disregarded – it did not even acknowledge the existence of – the FCC's determination in a notice-and-comment rulemaking that such a refusal would violate Section 201(b); the Commission's reaffirmation of that conclusion in an *amicus curiae* brief in this litigation; respondents' own assertion to the court of appeals (in earlier litigation involving APA review of the FCC's rules) that PSPs could recover damages under Section 207 if IXCs failed to pay the required compensation; or the court's endorsement of and reliance on that assertion when it upheld the FCC's rules. Instead, the panel asserted that "the Commission did not attempt" to construe Section 201(b) to encompass a violation of its payphone compensation rules. App., *infra*, 17a.

The Ninth Circuit reached the opposite conclusion when it considered precisely the same question. *Metrophones Telecom-*

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[1] Unless otherwise indicated, all references to "sections" in this petition refer to sections codified in 47 U.S.C.

munications, Inc. v. *Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (2005), petition for cert. pending, No. 05-705. It held that Congress delegated authority to the FCC to define unjust or unreasonable practices, that the FCC had authoritatively construed the statute, and that its construction was reasonable because "allowing for private actions to recover payphone compensation is an integral part of the regulatory system that Congress ordered the Commission to design." *Id.* at 1070. The Ninth Circuit properly granted deference to the FCC's interpretation of the statute, under the principles established in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and *Nat'l Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 125 S. Ct. 2688 (2005). Notably, the emphatic reaffirmation in *Brand X* of the deference owed to the FCC occurred one day before the D.C. Circuit panel issued its ruling, and the Ninth Circuit relied heavily on *Brand X* in *Metrophones*, but the D.C. Circuit's opinion makes no mention of *Brand X*, and the panel did not amend its opinion on hearing after *Brand X* and *Metrophones* were called to its attention.

This conflict with the Ninth Circuit's *Metrophones* decision is only one of several circuit conflicts presented by this case.[2] The D.C. Circuit held that there is no right to sue for a violation of Section 201(b) if the FCC has not yet determined whether the alleged practice is unjust or unreasonable – in other words, that PSPs cannot even initiate a lawsuit because the merits of their

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[2] Global Crossing Telecommunications, Inc., the appellant in *Metrophones*, has also filed a petition for a writ of certiorari, No. 05-705 (docketed Dec. 2, 2005). That petition, like this one, seeks certiorari because of the circuit conflict on whether a violation of Section 201(b) gives rise to a right of action. This petition also seeks review of related arguments not raised in the *Metrophones* petition: a circuit conflict concerning the interpretation of Section 416, and the D.C. Circuit's misinterpretation of *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), in holding that a right of action cannot be based on violations of Section 276.

claims have not yet been decided. A long line of decisions by this Court and by other courts of appeals reject that proposition.

The court of appeals also held that petitioners have no right of action to allege that respondents violated Section 416(c). That decision rests on the conclusion – again contrary to the FCC's construction of the statute – that Section 416, which requires compliance with "[e]very order of the Commission," does not require compliance with the payphone compensation order because it is a rulemaking order, rather than an adjudicatory order. As the D.C. Circuit acknowledged, six other circuits have rejected that proposition.

Finally, the court held that Section 207 does not provide a right of action to allege violations of Section 276. That statutory provision unambiguously expresses Congress's judgment that PSPs must be compensated for "each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1). But the court decided that a carrier's failure to pay the compensation required by law does not violate Section 276.

The D.C. Circuit's disregard for the views of the agency charged with administering a complex regulatory scheme will exacerbate confusion and inconsistency in the lower courts, will undermine national uniformity in implementing an important congressional policy, and will inflict a serious injustice on petitioners by denying them the compensation Congress required.

A. The Regulatory Framework Created By Congress

Before 1990, PSPs frequently sent all long-distance calls from their payphones to a single IXC, pursuant to exclusive contractual arrangements under which the IXC would bill the caller (or the called party) and remit compensation to the PSP for the use of its payphone.[3] Congress ended such exclusive

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[3] This arrangement is more convenient for callers and entails much lower

arrangements in 1990. It enacted legislation – the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), codified at 47 U.S.C. § 226 – that required PSPs to permit callers to use the services of *any* IXC, not just the IXC who had contracted with the PSP. See 47 U.S.C. § 226(c)(1)(B).

"Dial-around" calls (so named because a caller can "dial around" the IXC that has a contractual arrangement with the PSP, *e.g.*, by placing an "800" call to reach another IXC's network) enabled companies like AT&T and Sprint to generate millions of dollars in revenue by providing calling-card and toll-free calling services that could be used from any payphone, but left PSPs largely uncompensated. See *APCC* v. *FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000) (describing industry history). Dial-around calls constituted about one-third of payphone usage when these cases were filed (*APCC* v. *AT&T* Compl. ¶ 15), and the absence of compensation for such calls severely reduced PSPs' incentives to deploy and maintain payphones, threatening the public's access to a critical service.

Congress had some sense of this risk when it enacted TOCSIA, and directed the FCC to "consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones" for dial-around calls. 47 U.S.C. § 226(e)(2). The FCC did so in a series of rulemakings. See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 F.C.C.R. 4736 (1991) (First Report and Order); *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, 7 F.C.C.R. 3251

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transaction costs than direct payment from the caller to the PSP. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20,541, 20,580 ¶ 77 (1996) (First Order).

(1992) (Second Report and Order). In those rulemakings, the FCC stated that it was acting pursuant to its authority under Section 201, which requires that "charges, practices, classifications, and regulations for and in connection with" a common carrier's services must be "just and reasonable." See, e.g., First Report and Order ¶ 59; Second Report and Order ¶ 66.

It quickly became apparent that the TOCSIA regime would not ensure adequate compensation for PSPs. In 1996, Congress took forceful measures to address the problem. To "promote the widespread deployment of payphone services to the public," Congress directed the FCC to "take all actions necessary * * * to prescribe regulations that establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones." 47 U.S.C. § 276(b)(1). The FCC developed such a plan and has modified it from time to time through a series of notice-and-comment rulemakings. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 F.C.C.R. 19,975, 19,977-19,983 ¶¶ 5-17 (2003) (2003 Order) (describing regulatory history). The FCC's compensation plans generally have required an IXC to pay compensation when it is the primary economic beneficiary of a call. See, *e.g.*, First Order, 11 F.C.C.R. at 21,277 ¶ 83.

In rulemakings under the 1996 Act, as in rulemakings under TOCSIA, the FCC identified Section 201 as one of the sources of its statutory authority to prescribe regulations. See, *e.g.*, First Order, 11 F.C.C.R. at 20,720 ¶ 364; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 F.C.C.R. 1778, 1845 ¶ 166 (1997); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 F.C.C.R. 2545, 2648 ¶ 232 (1999) (1999 Order). In the first

rulemaking, the FCC requested comment on its tentative conclusion that it should exercise its jurisdiction under Section 201(b) "to ensure that PSPs are compensated for international as well as interstate and intrastate calls." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 F.C.C.R. 6716, 6726 ¶ 18 (1996). After considering comments on that question, the FCC concluded that Section 201(b) provided statutory "authority * * * to ensure that PSPs are fairly compensated for international as well as interstate and intrastate calls." First Order, 11 F.C.C.R. at 20,569 ¶ 54.[4] Sprint and AT&T both participated in this rulemaking and sought review of other aspects of the First Order, but did not seek review of the FCC's assertion of Section 201(b) jurisdiction. Indeed, AT&T's comments endorsed the FCC's tentative conclusion. AT&T Comments, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996* at 5 (July 1, 1996).

In its 1999 Order, the FCC decided that its per-call compensation rate would not include allowances to cover the bad-debt expenses that PSPs incurred when IXCs refused to pay the amounts they owed. 1999 Order, 14 F.C.C.R. at 2618-2620 ¶¶ 160-162. PSPs challenged that decision in the D.C. Circuit. AT&T and Sprint intervened to defend the FCC's decision; they argued that the decision was reasonable because a carrier's "failure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages as well as fines and penalties. See 47 U.S.C. §§ 206-208, 501-03." Final Joint Brief of Long Distance, Paging, and Consumer Intervenors in Support of Respondents, *APCC* v. *FCC*, No. 99-1114 (filed Sept. 7, 1999). That assertion *necessarily* means that a failure

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[4] The FCC also invoked its authority under Section 4(i), 47 U.S.C. § 154(i), which authorizes the promulgation of rules that are "necessary in the execution of [the Commission's] functions."

to pay compensation violates *the Act* (in addition to violating the FCC's rules) and that damage actions can be brought *in federal court* (and not merely in FCC proceedings) because Section 206 establishes liability only for violations of "this Act" and Section 207 states that injured parties "may either make complaint to the Commission * * * or may bring suit * * * in any district court." The court of appeals agreed that unpaid compensation could be recovered under Sections 206-208 – directly quoting AT&T's and Sprint's brief to emphasize the point – and relied on that fact in holding that the FCC's exclusion of bad-debt costs was reasonable. *APCC* v. *FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000).[5]

In its 2003 rulemaking, the FCC asked "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 18 F.C.C.R. 11,003, 11,012 ¶ 19 (2003). The answer to that question had a direct bearing on which party should be required to compensate PSPs for calls ultimately terminated by "switch-based resellers." To address the bad-debt issue, the FCC sought to determine the available remedies for nonpayment of required compensation. PSPs argued that IXCs should be required to pay for such calls (with a right to recover from switch-based resellers the amounts paid) because PSPs had difficulty collecting from the switch-based resellers. AT&T, in

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[5] In this litigation, AT&T and Sprint have argued exactly the opposite. They have asserted that a failure to comply with the FCC's payphone compensation *regulations* is not and cannot be a violation of *the Act*, and that Sections 206-208 authorize actions only based on violations of *the Act*. While conceding that compliance with the payphone compensation rules may be enforced through penalties payable to the government under Sections 502 and 503, they have not conceded that PSPs can pursue an action for damages either at the FCC or in federal court. See Oral Arg. Tr., *APCC Services, Inc.* v. *Sprint Communications Co. L.P.*, D.C. Cir. No. 04-7034, at 12-13 (Oct. 21, 2004).

response, pointed to PSPs' right to recover damages under Sections 206-208 and argued that PSPs "should use those remedies rather than simply shift the collection problem to someone else." Comments of AT&T Corp. at 19 (June 23, 2003). The FCC again supported the position of the IXCs. Echoing AT&T's comments, the FCC opted to leave PSPs responsible for pursuing collection of the unpaid compensation, emphasizing the court of appeals' previous statement that Sections 206-208 provided a remedy to recover unpaid compensation. The FCC then stated, unequivocally, "A failure to pay in accordance with the Commission's payphone rules * * * constitutes both a violation of section 276 and an unjust or unreasonable practice in violation of section 201(b) of the Act." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 F.C.C.R. 19975, 19990 ¶ 32 (2003) (2003 Order).

Despite the FCC rules, AT&T, Sprint, and other IXCs have failed to pay the required compensation for millions of calls. PSPs turned to petitioners to seek recovery of this unpaid compensation. Petitioners are "aggregators" who operate as intermediaries between PSPs and IXCs. They collect billing information from PSP clients, provide that information to IXCs or their agents, collect the IXCs' payments, and distribute those payments to their PSP clients. Petitioners provide those billing and collection services to approximately 1400 PSPs that own and operate more than 400,000 payphones, each of which may be entitled to compensation from hundreds of IXCs. Each PSP whose compensation is at issue in this litigation initially granted a power of attorney to its aggregator to deal with IXCs for billing and collection matters and later assigned its claims to the aggregator for litigation and collection.[6]

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[6] Petitioners Jaroth, Inc., NSC Telemanagement, and Peoples Telephone Co. also seek to recover unpaid compensation as owners of PSPs. Thus, they assert direct claims, in addition to claims they assert as assignees.

B. The District Court Proceedings

Petitioners filed separate suits against Sprint and AT&T in the district court for the District of Columbia, invoking the right of action provided in Section 207 and alleging that defendants had violated Section 276. Both cases were assigned to the same district court judge, as were other cases asserting similar claims against different defendants.[7]

Four years into the litigation, AT&T moved to dismiss the complaint, asserting that petitioners lacked standing because they had pledged to account to the assignor-PSPs for the litigation proceeds. The district court initially granted this motion (App., *infra*, 108a) but reversed its decision on reconsideration. App., *infra*, 78a. AT&T, in turn, requested reconsideration of that decision, which the district court denied. App., *infra*, 59a.

While standing issues were being litigated in the AT&T case, questions concerning PSPs' rights to sue for damages were raised in litigation in other jurisdictions. District courts struggled with the question whether a violation of the payphone compensation rules constitutes a violation of Section 276 that gives rise to a cause of action under Section 207. A district court in the Northern District of California held that there is a right of action. *Precision Pay Phones* v. *Qwest Communications Corp.*, 210 F. Supp. 2d 1106 (N.D. Cal. 2002). District courts in the Eastern District of Texas, the Southern District of California, and the Central District of California held that there is no right of action. *Phonetel Tech., Inc.* v. *Network Enhanced Telecomm.*, 197 F. Supp. 2d 720 (E.D. Tex. 2002); *W. Communications Syst.* v. *Global Crossing Telecomm., Inc.*, No. 01-CV-1468 (S.D. Cal. Sept. 20, 2001); *Greene* v. *Sprint Communications*, No. 02-CV-3841 (C.D. Cal. July 2, 2002).

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[7] Cases against WorldCom and Cable & Wireless were stayed when those defendants sought bankruptcy protection.

After the district court's decision in *Greene*, petitioners moved to amend their complaint against Sprint (and their complaint against Cable & Wireless in a case before the same judge) by adding claims under Sections 201(b) and 416(c). The court granted leave to amend, holding that there is a right of action under Section 207 to allege violations of Sections 201(b), 276, and 416(c). App., *infra*, 81a-93a; see also *id.* at 32a & n.3, 79a-80a. Contemporaneously, the Ninth Circuit affirmed dismissal in the *Greene* case, finding no right of action arising from a violation of Section 276. *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047 (2003), cert. denied, 541 U.S. 988 (2004). In light of the Ninth Circuit's decision, Sprint sought reconsideration of the district court's decision to permit amendment of petitioners' complaint in this litigation and also moved to dismiss the amended complaint.[8] The district court denied Sprint's motions and, noting the conflicting decisions in other courts, certified both the private-right-of-action questions and the standing question for interlocutory appeal. App., *infra*, 31a-45a. The court of appeals accepted the interlocutory appeals and consolidated the Sprint and AT&T cases. App., *infra*, 146a-147a.

C. The Court of Appeals' Decision

The court of appeals held (over Judge Sentelle's dissent) that the petitioner-assignees have standing, but a different ma-

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[8] AT&T did not move to dismiss or otherwise challenge in the district court the proposition that plaintiffs may sue for damages in federal court under the Communications Act. See App., *infra*, 47a n.3. However, AT&T fully participated in the appeal of that issue when its case was consolidated with Sprint's case in the D.C. Circuit, and the disposition of that issue will control the case against AT&T on remand to the district court. Because AT&T never moved to dismiss the case for lack of a private right of action, plaintiffs never took the formality of amending their complaint to add citations to all the statutory sections they invoked against Sprint. Should this Court grant certiorari and hold that there is a right of action under any section of the Communications Act, the district court presumably would allow an amendment of the complaint against AT&T, if necessary.

jority held that petitioners have no right of action to pursue the claims.

Over Chief Judge Ginsburg's dissent, two judges held that the alleged violation of Section 201(b) did not give rise to a cause of action under Section 207. The majority asserted that the question "is not so much whether there is a private right of action, but where – directly in district court, or in the Commission"[9] – and apparently believed that the conduct alleged in this case could violate Section 201(b) only if "*any* * * * violation of a Commission order" would be an unjust or unreasonable practice. App., *infra*, 15a (emphasis added). The majority observed that the FCC cited Section 201(b) as a source of its authority to issue the 1999 Order but found it significant that, in the body of that order, the FCC did not discuss whether the rules would be privately enforceable in court. App., *infra*, 16a. "A court should be reluctant to put words in the Commission's mouth – here, the words 'unjust and unreasonable.' The Commission never, in its 1999 Order, specified that a carrier's failure to pay was of this magnitude. Given the potential consequences to judicial dockets of the Commission's making that finding, we should require a clear statement (and analysis) by the agency." App., *infra*, 16a. The majority did not question the FCC's "power to interpret § 201(b) to encompass violations of its rules * * *. We do say the Commission did not attempt to exercise any such power here." App., *infra*, 17a.

That conclusion entirely ignored the FCC's 2003 Order, which stated clearly that a failure to pay in accordance with the

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[9] Although the court made clear that PSPs could file claims for damages in FCC proceedings, it did not explain what effect, if any, the dismissal of cases filed in district court might have on the application of the statute of limitations (in FCC proceedings) to claims asserted in this litigation that would lie outside the statute of limitations (if it is not tolled) if petitioners take their complaint to the FCC. See 47 U.S.C. § 415(b) (two-year statute of limitations for complaints seeking recovery of damages).

payphone rules violates Section 201(b). Even respondents concede that the FCC "has spoken" on that issue.[10] They have never suggested that the FCC's interpretation of the statute is unclear; instead, they have argued that the interpretation was impermissibly inconsistent with other provisions of the Act.[11]

The majority also ignored the *amicus* brief that the FCC had submitted – even though counsel for the FCC had participated in oral argument, and had made a post-argument written submission in further support of the FCC's construction of Section 201(b). The FCC's brief explained that the FCC had determined that a failure to pay compensation in accordance with the payphone rules is an unjust or unreasonable practice that violates Section 201(b), and also violates Sections 276 and 416(c) of the Act. The FCC explained that the statute confers on PSPs a right to be fairly compensated for each and every completed call; that the FCC exercised its delegated authority to apply and interpret the statutory requirements by adopting the payphone rules and by declaring a violation of those rules to be unjust or unreasonable; and that – as the FCC was contemporaneously arguing to this Court in *Brand X* – its authoritative interpretation of the statute is entitled to deference under *Chevron*.

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[10] At argument, Judge Ginsburg quoted from paragraph 32 of the FCC's 2003 Order, then asked respondents: "So the Commission has spoken to that, right? Mr. Murray: Yes. Judge Ginsburg: They have said this is an unjust, would be an unjust and unreasonable practice. Mr. Murray: Yes, Your honor." Oral Arg. Tr., *APCC Services, Inc.* v. *Sprint Communications Co. L.P.*, D.C. Cir. No. 04-7034, at 8 (Oct. 21, 2004).

[11] The majority did not accept respondents' legal arguments that Section 201(b) could not be construed to encompass violations of the payphone rules. See App., *infra*, 17a ("We do not say that the Commission has no power to interpret § 201(b) to * * * create private rights of action in courts * * *."). Judge Ginsburg emphatically rejected the arguments. App., *infra*, 28a (respondents "do not even purport to ground that limitation in the text [of the statute]. Nor is there any precedent supporting such a limitation."). So did the Ninth Circuit. *Metrophones*, 423 F.3d at 1067-1069.

The FCC also explained that respondents' arguments would undermine the congressional policy of ensuring fair compensation to PSPs. The logic of respondents' statutory interpretation, the FCC explained, would preclude recovery of damages in any forum because the statutory provision that authorizes damage actions in federal court – Section 207 – is the same provision that authorizes such actions at the FCC. The Commission never contemplated that *all* claims for damages would be brought before the agency, and cutting off the right to pursue such claims in court would impose unexpected burdens on FCC resources. Moreover, the FCC's brief explained that judicial resolution of such cases would raise no genuine concern about the consistent interpretation of FCC policy, because the cases involve largely factual questions. Brief For Federal Communications Commission As Amicus Curiae In Support Of Appellees, *APCC Services* v. *Sprint Communications Co. L.P.*, D.C. Cir. No. 04-7034 (Aug. 23, 2004) (FCC Br.). Yet the majority opinion did not acknowledge the FCC's brief.

Chief Judge Ginsburg dissented. He explained that the FCC had offered its authoritative interpretation of Section 201(b), and that the majority could say otherwise "only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position." App., *infra*, 27a. He opined that the FCC's interpretation was consistent with the statute and was entitled to deference under *Chevron*. "One would * * * be hard-pressed to say the Commission acted unreasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice." App., *infra*, 30a. He disputed the majority's premise that the FCC's determination would mean that every violation of an FCC regulation is an unjust or unreasonable practice; the question is whether a violation of *this* regulation is unjust or unreasonable. Chief Judge Ginsburg also took issue with the majority's contention that the FCC did not adequately justify a statutory

interpretation that permits private suits in court. "It is not for the Commission to decide whether the plaintiffs may sue in federal court for a violation of the statute; the Congress has already made that determination." App., *infra*, 27a.

The court also held, unanimously, that there is no right of action to allege violations of Sections 416(c) or 276. There could be no violation of Section 416(c), the court held, because that section's reference to "[e]very order of the Commission" should be read to mean only adjudicatory orders, not rulemaking orders. The court recognized that six circuits have rejected that reading, but adopted the reasoning in *New England Telephone & Telegraph Co.* v. *Public Utilities Commission*, 742 F.2d 1 (1st Cir. 1984), which construed the term "order" in Section 401 to mean only adjudicatory orders. App., *infra*, 17a-20a.

Section 276 cannot support a right of action, the court held, because it lacks "rights-creating language" and does not require the FCC to designate IXCs as the party responsible for PSP compensation. A violation of FCC regulations issued pursuant to the statute is insufficient to support a right of action under Section 207 because Section 207 requires a violation of the Act, not merely a violation of FCC rules. App., *infra*, 11a-14a.

Petitioners sought rehearing and rehearing *en banc*, relying on (among other things) this Court's *Brand X* decision, which deferred to the FCC's interpretation of the Communications Act one day before the D.C. Circuit in this case refused to defer to the FCC's interpretation of the same Act. While the rehearing petition was pending, the Ninth Circuit (applying *Brand X*) unanimously held in *Metrophones* that PSPs could sue for violations of Section 201(b). The Ninth Circuit noted that its holding was in conflict with the D.C. Circuit's recent decision in this case, but expressly adopted the reasoning of Chief Judge Ginsburg's dissent and held that the FCC had reasonably determined that a failure to pay compensation is an unjust or unreasonable practice. 423 F.3d at 1066 n.5. Petitioners informed

the D.C. Circuit that its decision conflicted with *Metrophones*, but the court denied the petitions for rehearing (on a 2-1 vote) and rehearing *en banc* (on a 5-3 vote). App., *infra*, 148a-151a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Holding That There Is No Right Of Action Arising From A Violation Of Section 201(b) Conflicts With Decisions By This Court And Other Courts Of Appeals

Section 201(b) provides in pertinent part that "any * * * charge [or] practice * * * that is unjust or unreasonable is hereby declared to be unlawful." The Act's *express* private right of action allows damages in court whenever a common carrier "shall do * * * any act, matter, or thing in this chapter * * * declared to be unlawful." 47 U.S.C. § 206. Because in Section 201(b) all unjust or unreasonable practices are "declared to be unlawful" – the very language of Section 206 – it has never been disputed in this litigation that *every* unjust or unreasonable practice gives rise to an *express* private right of action.

What *is* in dispute is whether failure to comply with the FCC's dial-around compensation rules is an unjust or unreasonable practice. Oddly, however, the D.C. Circuit's opinion never actually answers that question. Instead of holding that such a failure is "just" and "reasonable" – as it would have to be for there *not* to be private right of action under Congress's express words – the D.C. Circuit's opinion focuses on the different question whether the FCC *has declared* the practice to be unjust or unreasonable. The answer to *that* question is indisputably yes, but the D.C. Circuit somehow answered it no. The D.C. Circuit therefore failed to defer to what the FCC *has* said.

Even if the relevant question were what the FCC has declared, rather than what is "just or reasonable," and *even if* the FCC had been as silent as the D.C. Circuit claimed, it would not follow that these lawsuits should be dismissed. What would

follow is that an appropriate mechanism – such as a primary jurisdiction referral – should be used to ascertain the FCC's views. A primary jurisdiction referral to ascertain views the FCC has already expressed clearly would make little sense in this case. That fact – and the existence of the doctrine for dealing with the situation the D.C. Circuit *claimed* it was confronting, without dismissing lawsuits as a result – simply highlights how untenable is the D.C. Circuit's insistence on dismissal of this case.

A. The Decision Conflicts With The Ninth Circuit's Holding In *Metrophones* That There Is A Right Of Action To Sue For Violations Of Section 201(b) And With This Court's Deference Decisions

The D.C. Circuit's ruling squarely conflicts with the Ninth Circuit's decision in *Metrophones*. Both cases presented precisely the same question: Can a PSP sue for damages in federal court pursuant to the express right of action in Section 207, alleging that an IXC has violated Section 201(b) by failing to pay compensation in accordance with the FCC's rules? The Ninth Circuit held that there is a right of action to bring such suits; the D.C. Circuit held the opposite.

The two courts offered divergent answers to this question because they disagreed on a recurring question of broad importance: When does *Chevron* require deference to an agency's statutory interpretation?

The Ninth Circuit properly recognized that *Chevron* and *Brand X* govern this case. *Metrophones*, 423 F.3d at 1065-1070. It asked whether the FCC's 2003 Order, supplemented by its *amicus* brief, reflected an authoritative construction of an ambiguous statutory provision, *i.e.*, whether the agency was exercising authority delegated by Congress to fill in the gaps of the statutory scheme. See *Chevron*, 467 U.S. at 843-844; *Mead*, 533 U.S. at 226-227. The Ninth Circuit rejected the argument that the FCC's construction should be disregarded because it

came after *Greene*, which held that there is no right of action under Section 276. It correctly recognized that *Brand X* requires deference to the agency's interpretation, even if *Greene* could be interpreted as an implicit interpretation of Section 201(b). *Metrophones*, 423 F.3d at 1065.

The D.C. Circuit, however, did not believe that any of this Court's deference decisions even required *consideration* of the FCC's 2003 Order or its *amicus* brief. Perhaps the majority believed the FCC's interpretation was foreclosed by *Greene*, an argument that the court that decided *Greene* later rejected in *Metrophones* on the authority of *Brand X*. Perhaps it believed that an agency's brief is never entitled to deference or that the FCC's explanation was too cryptic. But cf. *Nat'l Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 419-420 (1992) (extending *Chevron* deference to interpretation offered in agency's brief when interpretation was "a necessary presupposition" of the agency's decision); *Metrophones*, 423 F.3d at 1065-1067 (extending *Chevron* deference despite brevity of FCC's interpretation). Whatever the reason for the majority's unexplained refusal to consider the agency's interpretation, that refusal reflects a fundamental divergence with the Ninth Circuit on an issue of great importance in administrative law.

The D.C. and Ninth Circuits also applied entirely different standards when they evaluated the substance of the FCC's interpretation. The Ninth Circuit asked whether the FCC reasonably interpreted Congress's policy to ensure compensation to PSPs and whether its interpretation would promote that congressional objective. 423 F.3d at 1070. The D.C. Circuit never asked if the FCC's interpretation would promote the objectives of the Act; instead, it demanded that the FCC justify its interpretation in light of the "potential consequences to judicial dockets" and faulted the FCC for failing to justify *Congress's* judgment, expressed in Section 207, that damages could be recovered in court as well as through FCC proceedings. App., *infra*, 16a.

These irreconcilable views of the proper relationship between agency and court can only lead to further confusion among the lower courts when they apply *Chevron* and its progeny, including the *Brand X* decision on which the Ninth Circuit heavily relied. The potential for inconsistency is especially troublesome because the agency here was construing a statute that requires "just and reasonable" rates and practices. The "just and reasonable" standard is ubiquitous in federal regulatory schemes, and until now has always been thought to call for the highest order of deference to the agency assigned to flesh it out. See *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 501-502 (2002). The circuit conflict will undermine consistency and transparency in review of agencies' interpretations of that standard – interpretations that control a wide array of business practices in regulated industries.

Furthermore, the D.C. Circuit's decision is simply wrong. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 125 S. Ct. at 2699. Citing Section 201(b), the very provision of the Communications Act at issue here, this Court held in *Brand X* that "[t]he *Chevron* framework governs our review of the Commission's construction." *Ibid.* The D.C. Circuit gave no reason – it did not even *try* to give a reason – for its failure to apply the *Chevron* framework to the FCC's construction of Section 201(b).

B. The D.C. Circuit's Decision Conflicts With A Large Body Of Law Applying The Primary Jurisdiction Doctrine

Even if the FCC had not yet decided whether a failure to pay compensation is an unjust or unreasonable practice, the D.C. Circuit's judgment would be wrong. That judgment suggests that a practice cannot be unjust or unreasonable unless the

FCC has *previously* found it to be unjust or unreasonable – in other words, that there is no right of action to assert a claim that conduct is unlawful unless the agency has already determined it to be unlawful. That proposition conflicts with *Reiter* v. *Cooper*, 507 U.S. 258, 268 (1993), and other cases applying the primary jurisdiction doctrine.[12]

Federal courts have entertained countless cases alleging violations of Section 201(b) and closely related provisions. See, *e.g.*, *In re Long Distance Telecommunications Litigation*, 831 F.2d 627 (6th Cir. 1987); *Pac. Tel. & Tel. Co.* v. *MCI Telecommunications Corp.*, 649 F.2d 1315 (9th Cir. 1981); *Nat'l Comm's Ass'n, Inc.* v. *AT&T*, 46 F.3d 220 (2d Cir. 1995); *Allnet Communication Service, Inc.* v. *Nat'l Exchange Carrier Ass'n, Inc.*, 965 F.2d 1118 (D.C. Cir. 1992) (Section 203). These cases are cognizable in court under the right of action expressly provided in Section 207, but in many such cases it is unclear at the outset whether the FCC would regard the alleged practice as a violation of the Act. As this Court and others have recognized, such uncertainty about the merits of a claim does not require dismissal; rather, uncertainty about whether a practice qualifies as unjust or unreasonable calls for a primary jurisdiction referral so the agency can address the unresolved question before the court renders judgment on the claim that is properly before it.

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[12] We did not suggest a primary jurisdiction referral to the FCC before the D.C. Circuit panel issued its opinion, and we do not think it is the right disposition now. Our point, rather, is that primary jurisdiction referrals are one way to deal with the situation – which this case does *not* present, though the D.C. Circuit insisted it *did* – in which the expert agency's view on a critical question is "anyone's guess." App., *infra*, 16a. And our further point is that the primary jurisdiction doctrine demonstrates that courts accept clarifications of agency positions *after* litigation is under way, rather than demand – as the D.C. Circuit seems to have done – a *prior* "clear statement (and analysis) by the agency" just because of "potential consequences to judicial dockets." App., *infra*, 16a.

The opinion below conflicts with a large body of law applying this doctrine. The panel majority's view – that a practice is not unjust or unreasonable unless the FCC has *already* determined that it is unjust or unreasonable – cannot be reconciled with the *existence* of the primary jurisdiction doctrine. A primary jurisdiction referral *presupposes* an unresolved question that requires the agency's special competence; if there is no such unresolved question, primary jurisdiction referral is unnecessary and inappropriate. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, (1976) (reversing primary jurisdiction referral of common-law tort claims because those claims did not turn on whether practice was unfair or deceptive under Federal Aviation Act); *Brown* v. *MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002) (dismissal of Section 207 case on primary jurisdiction grounds, merely because claim related to a tariff, reversed; primary jurisdiction referral is required only if a claim presents "an issue of first impression, or * * * a particularly complicated issue that Congress has committed to a regulatory agency"); *Nat'l Comm'ns Ass'n, Inc.* v. *AT&T*, 46 F.3d 220 (2d Cir. 1995) (primary jurisdiction referral in Section 201(b) case reversed because case did not present policy question that required agency expertise or entail a risk of inconsistent interpretations); *Pac. Tel. & Tel.* v. *MCI Telecommunications Corp.*, 649 F.2d 1315 (9th Cir. 1981) (summary judgment, entered by district court in Section 201(b) case after FCC determined that practice was lawful, reversed when FCC undertook reconsideration of its prior decision). If the majority's view were correct, there would *never* be occasion for courts to make primary jurisdiction referrals.

This Court's decision in *Reiter* provides a clear illustration. The Interstate Commerce Act required carriers to charge "reasonable" rates and provided a right of action to recover damages from carriers if the ICC found that their rates were unlawful. The respondents in *Reiter* argued, much as the D.C. Circuit held here, that petitioners' claims were "not yet cognizable in court"

because petitioners did not secure a determination of unreasonableness from the agency before filing suit. 507 U.S. at 267-268. This Court rejected that argument. Even though a primary jurisdiction referral was required so that the agency could determine whether the rates were unreasonable, such a referral "does not deprive the court of jurisdiction," and therefore petitioners could pursue their claims in court. *Id.* at 268.

Although a primary jurisdiction referral can sometimes result in the dismissal of a case, any such dismissal must be "without prejudice" and can be entered only "if the parties would not be unfairly disadvantaged." *Reiter*, 507 U.S. at 268-269; see also *United States* v. *Michigan National Corp.*, 419 U.S. 1, 4-5 (1974). To dismiss litigation with prejudice because of purported uncertainty about agency views – rather than stay the litigation and allow the agency to makes its views known without cutting off parties' rights – is contrary to this Court's decisions and is error. See *Syntek Semiconductor Co., Ltd. v. Microchip Technology, Inc.*, 307 F.3d 775, 777 (9th Cir. 2002) (on reconsideration, ordering stay rather than dismissal pending primary jurisdiction referral because statute of limitations might preclude refiling of claim); *In re Long Distance Telecommunications Litigation*, 831 F.2d at 632 (reversing dismissal of 201(b) claims and ordering stay pending primary jurisdiction referral).

II. The Decision Deepens A Circuit Conflict On The Recurring Question Whether References To "Orders" In The Communications Act Encompass Rulemaking Orders

The court of appeals also held (in this instance, unanimously) that petitioners have no right of action under Section 207 to allege violations of Section 416, which imposes a "duty" on "every person * * * to observe and comply with" "[e]very order of the Commission." The court held that the term "order" in Section 416 refers only to adjudicatory orders and does not encompass rulemaking orders.

That holding adds to the confusion in the lower courts. The term "order" is not defined in the Act, but is used in a series of interrelated statutory provisions. See, *e.g.*, 47 U.S.C. § 401 (jurisdiction to enforce orders); *id.* § 402 (proceedings to set aside orders); § 408 (effective date of orders); *id.* § 416(c) (duty to obey orders). In *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942), this Court held that the term "order" in Section 402 encompassed regulations issued through the FCC's rulemaking process. "[I]t is the substance of what the Commission has purported to do and has done which is decisive." *Id.* at 416. The FCC's regulations were deemed an "order" because they were "adopted by the Commission in the avowed exercise of its rule-making power" and "have the force of law." *Id.* at 417.

Six circuits have followed that approach in holding that FCC rulemaking orders are "orders." See App., *infra*, 19a (referencing precedents from the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits). The First Circuit, however, while recognizing this Court's holding that an "order" under Section 402 could be a rulemaking order, nonetheless held that only adjudicatory orders could be "orders" under Section 401. *New England Telephone & Telegraph Co.* v. *Public Utilities Commission*, 742 F.2d 1 (1st Cir. 1984) (Breyer, J.).

The circuit split is compounded by the Ninth Circuit's *Metrophones* decision. That decision (applying *Hawaiian Tel. Co.* v. *Pub. Utilities Commission*, 827 F.2d 1264 (9th Cir. 1987)) held that the term "order" in Section 416(c) encompasses the rulemaking order that requires payment to PSPs. It also observed that "[i]t is technically true that § 416(c) makes a violation of any 'order' of the Commission a violation of the statute itself." 423 F.3d at 1071. But then it concluded that it was unreasonable for the FCC to interpret Section 416(c) in accordance with the literal language of the statute: "[T]o hold that §§ 206 and 207 encompass all violations of § 416(c) would

render superfluous the requirement that an action under § 206 allege a violation of a *statute*." *Ibid.* (emphasis in original).

That reasoning makes no sense. If the language in Section 416 requires or permits the term "order" to be construed to encompass rulemaking orders, as the Ninth Circuit recognizes, it is the unambiguous language of the *statute* – not the FCC's construction of the statute – that makes a violation of "every" order a violation of the Act. That reading of Section 416 does not mean that every violation of a regulation gives rise to a right of action under Sections 206 and 207, and does not make those sections superfluous.[13] It simply means, as the statute plainly says, that there is a duty to comply with all FCC orders, not merely to comply with some orders. Since it is "technically true" (and hardly surprising) that this is what the statute requires, the FCC's interpretation of the statute – which was reiterated in its brief in this case (FCC Br. 14) – is at least a permissible interpretation, if not the *only* permissible interpretation.

Regardless of the merits, the conflicting interpretations of the Act generate confusion and inconsistency. There are now at least three conflicting views in the courts of appeals – the D.C. and First Circuits' view that "order" does not encompass rulemaking orders; the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits' view that "order" does encompass rulemaking orders; and the Ninth Circuit's view that "order" encompasses rulemaking orders, but that it is unreasonable to construe "every"

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[13] Sections 206 and 207 create a right of action only against common carriers (not against other parties that violate FCC regulations); only if the plaintiff suffers damages; and only if the damages are suffered "in consequence of" the violation. Because of these requirements, most violations of FCC rules are not redressable in court. Indeed, even though it has been clearly established in six circuits that rulemaking orders are "orders" under the Act, very few cases alleging violations of FCC rules have been filed in those circuits.

order to mean "every" order, in light of Section 206. Certiorari should be granted to end this confusion.

III. The D.C. Circuit's Decision That An IXC Cannot Violate Section 276 Conflicts With This Court's Decision In *Alexander* v. *Sandoval*

The court also failed to acknowledge the FCC's contrary interpretation of the statute when it held (unanimously) that PSPs have no right of action to allege violations of Section 276. That holding was based largely on the court's distinction between a violation of the Act (which is required to invoke the right of action under Section 207) and a violation of FCC regulations. Section 276, the court suggested, "is by its terms addressed neither to the rights of PSPs nor to the obligations of IXCs." App., *infra*, 13a-14a. "Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision." App., *infra*, 14a. The court's reasoning rests on a misreading of *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and a failure to apply *Chevron* principles when defining rights of action to enforce statutes and regulations.

Under the proper reading of *Sandoval* and *Chevron*, the distinction between the Act and FCC regulations is a distinction that makes no difference. Both the Ninth Circuit (in *Greene*) and the D.C. Circuit (in this case) correctly recognized that "rights-creating language" in a statute supports a right of action. Section 276 contains such language. Congress could hardly have expressed more clearly its judgment that PSPs are entitled to fair compensation for every call. Section 276 states that "the Commission *shall* take *all actions necessary* * * * to prescribe regulations that (A) establish a per call compensation plan to *ensure* that *all* payphone service providers are fairly compensated for *each and every* completed intrastate and interstate call" (emphasis added). Unlike TOCSIA, which delegated discretion to the FCC to "consider" whether compensation was needed, Section 276 expresses an unambiguous congressional determi-

nation that *all* PSPs *must* be compensated, and for *every* call. See App., *infra*, 86a-88a. A compensation plan that did not satisfy those requirements could not pass muster under Section 276. And Section 206 establishes liability (enforced through the private right of action in Section 207) if a carrier does anything "declared to be unlawful" or fails to do things "required to be done" by the Act.

The observation that Section 276 does not specify *who* must pay compensation is irrelevant. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-844. Thus, the distinction between violations of the regulations and violations of the Act is an illusion in this context. As *Sandoval* explained, "[I]t is * * * meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284.

The cause of action asserted here is very different from the cause of action that was denied in *Sandoval*, where the plaintiffs sought to enforce disparate-impact regulations pursuant to a right of action to enforce 42 U.S.C. § 601, which prohibited only intentional discrimination. *Sandoval* rests on the point that "the disparate-impact regulations do not simply apply § 601–since they indeed forbid conduct that § 601 permits – and therefore * * * the private right of action to enforce § 601 does not include a private right to enforce these regulations." 532 U.S. at 285. The Court made clear that *regulations* addressing intentional discrimination – the conduct addressed in Section 601 – could be enforced under a right of action to enforce *the statute*: "We do not doubt that regulations applying § 601's ban on

intentional discrimination are covered by the cause of action to enforce that section [because] [s]uch regulations * * * authoritatively construe the statute itself." *Id.* at 284.

The same logic should control this case. The FCC's payphone rules do no more than Congress required, when it demanded compensation for every payphone call. The regulations authoritatively construe the requirements of Section 276 and here, as in *Sandoval*, it is "meaningless" to distinguish between a violation of that section and a violation of regulations that authoritatively construe that section. The FCC's refusal to draw that meaningless distinction, and its determination that a violation of its rules is a violation of Section 276 is a reasonable interpretation of the statute that is entitled to deference.

Although no judge of a court of appeals has yet accepted the argument that there is an express private right of action to enforce Section 276 and its implementing regulations, this Court should grant certiorari to decide whether *any* provision of the Communications Act allows these lawsuits to proceed. The Court should not confine its attention to the statutory provisions on which there are circuit splits. First, the misinterpretation of *Sandoval* that underlies the reasoning of both the court below and the Ninth Circuit in *Greene* deserves correction by the Court that wrote the misinterpreted *Sandoval* opinion, lest that misunderstanding create even more erroneous judgments (with respect to this and other statutes) in the courts of appeals. Second, if any one provision of the Communications Act is construed (in conjunction with Sections 206-207) to allow this action to proceed, construction of the other provisions will become unnecessary, and this Court should not artificially exclude from consideration the very statute in which Congress focused on the problem being litigated, namely the nonpayment of PSPs for dial-around calls. If the Court grants certiorari, it should consider whether the Communications Act – not just Section 201(b) or Section 416(c) – supports a private right of action for PSPs.

IV. Confusion And Inconsistency In Lower Court Decisions Threatens The Development And Administration Of A Coherent Regulatory Regime To Achieve Congressional Objectives

This Court should grant certiorari to address the palpable confusion and inconsistency in the lower courts' decisions. In the Ninth Circuit, PSPs can sue in federal court by alleging a violation of Section 201(b). In the D.C. Circuit, they cannot. In the D.C. Circuit, though, they apparently can take their complaint to the FCC, even though the statute that authorizes damage actions at the FCC states unambiguously that complaints may be filed at the FCC *or* in federal court.

In the First Circuit and the D.C. Circuit, PSPs cannot sue by alleging a violation of Section 416(c) because, in those circuits, a rulemaking order is not an "order." In the Ninth Circuit, they cannot sue because, even though an "order" is an "order," apparently "every" order cannot mean "every" order. In the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, PSPs presumably can sue under Section 207 by alleging violations of Section 416(c) – unless one or more of those circuits follows the Ninth Circuit's lead to hold that it is unreasonable for the FCC to construe the Act in accordance with its plain language.

Even within individual circuits, confusion reigns. One Ninth Circuit panel, in *Greene*, held that the need for a "coherent national communications policy" is reason to deny a right of action to sue under Section 276, lest "interpretation of a finely-tuned regulatory scheme" rest in the hands of "judges, instead of in the hands of the Commission." 340 F.3d at 1053. Of course, *judges* reached that conclusion without even considering the conclusion of the FCC – the agency responsible for developing and administering a coherent national policy – that there *is* a right of action under Section 276. When a different Ninth Circuit panel considered the FCC's views in *Metrophones*, it held that "the ability of PSPs to recover compensation * * * in

private actions [is] integral to the proper functioning of the payphone compensation system." 423 F.3d at 1066. *That* panel, though, refused to defer to the FCC's construction of Section 416(c) – a construction that was consistent with the Ninth Circuit's precedent in *Hawaiian Telephone Co.* – at the same time that it extended deference to the FCC's construction of Section 201(b) in its 2003 Order – an order whose construction of Section 276 contradicted Ninth Circuit precedent.

The FCC's construction of Section 201(b), which the Ninth Circuit accepted, relied on the D.C. Circuit's conclusion that PSPs may recover damages under Sections 206-207. That interpretation received deference from the Ninth Circuit, but the D.C. Circuit would not even acknowledge the existence of the order – even though it adopted and relied on the D.C. Circuit's own prior decision. And the closest the D.C. Circuit came to an articulated reason for that disregard was the FCC's failure to explain a policy judgment made by *Congress*: that plaintiffs may sue in federal court, as well as complain to the FCC, when the Act is violated. Even where there is not yet a conflict between circuits – in the interpretation of Section 276 – the lower courts have misconstrued *Sandoval* in a manner that will frustrate clearly expressed congressional policy.

The confusing and conflicting rulings will seriously impede the FCC's efforts to develop and administer a coherent regulatory regime to achieve the objectives that Congress demanded. A refusal to permit lawsuits to recover unpaid compensation implicates both the substance and the enforcement of the FCC's compensation plan. The FCC has already made two critical substantive decisions in the design of its compensation plan – concerning the amount of compensation that should be paid for every payphone call and the identity of the party responsible for payment – that have been based in large measure on the FCC's belief that private suits for damages could be used to recover compensation if IXCs refused to obey the Commission's rules.

And, whatever the substance of the FCC's rules, the plan cannot succeed if IXCs can disregard the rules with impunity because enforcement mechanisms are lacking. The FCC has already explained that its plan was designed with the assumption that judicial enforcement would be available. If that assumption is wrong, the FCC will undoubtedly need to revise its compensation plan, budget additional resources for its own enforcement efforts, or both.

The confusion in the lower courts also disrupts the business of providing payphone and long-distance calling services. Petitioners disagree with much that is said in the petition for certiorari that has been filed in *Metrophones*, but that petition correctly identifies business and litigation uncertainty that arises from conflicting lower court decisions. Many PSPs and IXCs operate nationwide businesses. Lawsuits to recover unpaid compensation have been filed in district courts throughout the country. Allowing the confusion to continue would impose large costs and produce few, if any, benefits. See 05-705 Pet. 10-13.

Amid all this confusion, the lower courts have lost sight of the principles that should govern here. Congress decided that PSPs must be compensated for each and every completed call; it delegated to the FCC the authority to devise a coherent national policy to effectuate that directive; the FCC has construed ambiguous statutory provisions to further that policy, and to operate in conjunction with unambiguous statutory provisions that the FCC reads to mean just what the language says. Failure to adhere to these principles leaves congressional policy in a shambles, and will deny to petitioners the compensation to which *Congress* declared them entitled for millions of calls.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL W. WARD
Michael W. Ward, P.C.
1608 Barclay Boulevard
Buffalo Grove, IL 60089
(847) 243-3100

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
DAMON W. TAAFFE
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

**Counsel of Record*

DECEMBER 2005